(1) 89-No. 1492

In The

Supreme Court of the United States

October Term, 1989

RICHARD COLLIER,

Petitioner,

vs.

THE STATE OF NEW JERSEY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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QUESTIONS PRESENTED

1. Where an accused makes an equivocal statement that can be construed as a request for counsel, what is the "threshold standard of clarity" necessary to thereby invoke the protection of the Fifth Amendment and what duty is imposed upon law enforcement authorities to clarify the equivocal request before continuing questioning?

2. Is the due process clause of the Fourteenth Amendment to the Constitution, which requires the state to prove each and every element of a crime beyond a reasonable doubt, violated by the New Jersey "diminished capacity" statute, N.J.S.A. 2C:4-2, which requires that the defendant bear the burden of proving, by a preponderance of the evidence, the existence of a mental disease or defect "which would negate a state of mind which is an element of an offense?"

3. Does the Eighth Amendment proscribe the application of the New Jersey homicide statute, N.J.S.A. 2C:11-3a(2), to allow a conviction for "knowing murder" when the actor's mental state bears no relation whatsoever to the potentiality or risk of death?

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No.

In The

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October Term, 1989

RICHARD COLLIER,

Petitioner,

vs.

THE STATE OF NEW JERSEY,

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

OPINIONS BELOW

The memorandum decision of the Superior Court of New Jersey, Appellate Division, has not been reported. It is reprinted in the Appendix at p. 4a, *infra.*

STATEMENT OF JURISDICTION

The judgment of the Superior Court of New Jersey, Appellate

Division, was entered on May 23, 1989, affirming petitioner's conviction, dated June 21, 1985 (4a). On September 11, 1989, the Supreme Court of New Jersey denied a timely petition for certification (2a). On December 21, 1989, the Supreme Court of New Jersey granted a motion to file a petition for reconsideration and denied the petition for reconsideration (1a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

STATUTES INVOLVED

2C:4-2. Evidence of mental disease or defect admissible when relevant to element of the offense.

Evidence that the defendant suffered from a mental disease or defect is admissible whenever it is relevant to prove that the defendant did not have a state of mind which is an element of the offense. In the absence of such evidence, it may be presumed that the defendant had no mental disease or defect which would negate a state of mind which is an element of the offense. Mental disease or defect is an affirmative defense which must be proved by a preponderance of the evidence.

2C:11-3a(2). Murder.

a. Except as provided in section 2C:11-4 criminal homicide constitutes murder when:

1. The actor purposely causes death or serious bodily injury resulting in death; or

2. The actor knowingly causes death or serious bodily injury resulting in death; or . . . .

STATEMENT OF THE CASE

On June 21, 1985, the petitioner, Richard Bruce Collier, was convicted of knowing murder in violation of N.J.S.A. 2C:11-3a(2), after an eight day jury trial in Somerset County, New Jersey. A penalty phase hearing resulted in the jury being unable to determine whether the death penalty was warranted. Thus, on July 19, 1985, the petitioner was sentenced to a term of 30 years in the custody of the Commissioner of the Department of Corrections, with a parole ineligibility of 30 years.

The facts adduced at trial established that the petitioner knocked the victim, his girlfriend's son, on the floor, thereby rendering him unconscious. He then brought the boy to the hospital where, after several attempts to revive him, he was declared brain dead two days after the incident, removed from the ventilator, and died shortly thereafter. Through the trial, Collier, an admitted alcoholic, maintained that he was so intoxicated at the time of the incident that he recalled nothing of what occurred.

The evidence presented in the State's case at trial consisted in large part of a statement given by Collier to investigators from the Somerset County Prosecutor's Office which was admitted into evidence after a *Miranda* hearing, by the trial court. The statement constituted a confession by Collier, wherein he admitted to striking the child and knocking him unconscious on the day in question. The statement was given under the following circumstances. On September 13, 1985, Collier was picked up by investigators and taken to the Somerset County Prosecutor's Office for questioning. After being read his *Miranda* rights, Collier was questioned by Detective E. Clark Shedden of the Somerset County Prosecutor's Office in an untaped interrogation wherein Collier did not incriminate himself. Shortly thereafter, as the detective testified at the *Miranda* hearing, a ruse was perpetrated, which included

a false phone call to the detective designed to lead Collier to believe his girlfriend had given a statement incriminating Collier. Immediately thereafter, the continued interrogation went on tape. At this point, the following ensued between Collier and the detective:

> Richard Collier: Do you think I need an attorney or . . .
>
> Det. Shedden: Well, I am going to give you your rights and . . .
>
> Richard Collier: *I can't afford one anyway.*

Collier was then reread his *Miranda* rights, without any steps having been taken by the detective to clarify Collier's misunderstanding of his right to assigned counsel. Upon completion of the new *Miranda* warnings, Collier indicated that he would talk to the detective and stated, "*But I'm totally confused,* though O.K."

In a timely appeal to the Superior Court of New Jersey, Appellate Division, Collier asserted that the trial court erroneously charged the jury regarding "knowing murder" by advising the jury to convict Collier if it found that Collier knowingly inflicted serious bodily injury on his victim, without regard to Collier's state of mind concerning the potentiality of death. The petitioner based his argument upon the New Jersey Supreme Court decision which interprets the pertinent New Jersey homicide statute, N.J.S.A. 2C:11-3a(2), to require a prosecutor to prove that a defendant be practically certain his conduct would result in a victim's death in order to obtain a conviction for knowing murder. *State v. Breakiron,* 108 N.J. 591 (1987). The Appellate Division, in its memorandum decision, rejected this interpretation of the statute, and affirmed the petitioner's conviction. The tribunal held

that the awareness or knowledge requirement is in the alternative as to death or serious bodily injury under N.J.S.A. 2C:11-3a(2), relying upon the New Jersey Supreme Court's decision in *State v. Gerald*, 113 N.J. 40, 81-82 (1988) (14a, *infra*).

The appellate tribunal also rejected Collier's argument that his statements to law enforcement authorities during interrogation constituted an equivocal request for counsel, necessitating a cessation of interrogation and a clarification of Collier's statements before proceeding. The tribunal specifically held that the question posed by Collier to the interrogating officer did not invoke his right to counsel necessitating that interrogation cease (6a-7a).

In a timely petition for certification to the New Jersey Supreme Court, the petitioner argued that the Appellate Division's construal of the definition of knowing murder, based upon the New Jersey Supreme Court's decision in *State v. Gerald, supra,* was incorrect, as it produces an anomalous result in the New Jersey statutory scheme of sentencing. Petitioner argued that the much more culpable act of aggravated manslaughter (extreme indifference to human life resulting in death) brings on a much less serious penalty (possible 15 years mandatory) than the less culpable act of knowing murder inflicting serious bodily injury that results in death (30 years mandatory). *See State v. Gerald, supra,* 108 N.J. at 85 (O'Hern, dissenting).

Collier also argued to the New Jersey Supreme Court in his petition for certification that the Appellate Division's rejection of his appeal with regard to the admissibility of his confession was also erroneous.

The petitioner raises a third ground for granting a writ of certiorari for the first time herein. The argument is based upon the recent decision of the United States Court of Appeals, Third Circuit, *Humanik v. Beyer,* 871 F.2d 432 (3rd Cir. 1989), *cert.*

denied, ____ U.S. ____ (58 U.S.L.W. 3213, 1989), which was filed on March 31, 1989. Therein, the Third Circuit held that the requirement of N.J.S.A. 2C:4-2 that a defendant prove his mental disease or defect by a preponderance of the evidence in order to raise it as an affirmative defense constituted an unconstitutional shifting of the burden in a criminal trial. This opinion directly contradicts the holding of the New Jersey Supreme Court in *State v. Breakiron, supra,* that the statute is constitutional.

REASONS FOR GRANTING THE WRIT

I.

The New Jersey diminished capacity statute, N.J.S.A. 2C:4-2, violates the due process clause of the Fourteenth Amendment and is in conflict with the decision of this Court in *Martin v. Ohio,* 480 U.S. 228 (1987) and the opinion of the Third Circuit in *Humanik v. Beyer,* 871 F.2d 432, *cert. denied,* ____ U.S. ____ (58 U.S.L.W. 3213, 1989).

New Jersey's diminished capacity statute, N.J.S.A. 2C:4-2, has been addressed with regard to its meaning, scope and constitutionality in two recent New Jersey Supreme Court cases, *State v. Breakiron,* 108 N.J. 591 (1987) and *State v. Zola,* 112 N.J. 384 (1988). In *Breakiron,* the court held that the statute is constitutional as long as the State bears the ultimate burden of proving beyond a reasonable doubt the culpable mental state despite the presence of mental disease or defect. The statute provides that mental disease or defect is an affirmative defense that a defendant must prove by a preponderance of the evidence. In *State v. Zola,* the court again affirmed the constitutionality of the New Jersey statute, in spite of the fact that it places the burden on a defendant to prove the presence of a mental disease or defect.

In *Martin v. Ohio*, 480 U.S. 228 (1987), this Court relied on its decisions regarding shifting the burden of proof to defendant in criminal proceedings and emphasized that where there is evidence relevant both to an element of the offense charged and to an affirmative defense the jury must be instructed that the defendant's evidence on the affirmative defense must be considered in determining whether the State has proved all the elements of the offense regardless of whether the defendant has carried his burden of proof with regard to the affirmative defense. *Id.* at 233-34; *In re Winship*, 397 U.S. 358 (1970); *Mullaney v. Wilber*, 421 U.S. 684 (1975); *Patterson v. New York*, 432 U.S. 197 (1977).

Recently, in *Humanik v. Beyer*, 871 F.2d 432 (3rd Cir. 1989), the District Court of New Jersey in light of these Supreme Court decisions held that the application of the statute in a jury charge renders an unconstitutional understanding to a jury of their task, in inviting the jury to address first whether the defendant suffered from a mental disease or defect of the requisite kind. *Id.* at 25-27.

The court in the instant matter charged the jury that "the general assumption is that every man is normal and is possessed of ordinary facilities," in advising the jury of its duty to consider the evidence that petitioner drank alcoholic beverages on the date in question. Although this charge did not explicitly delineate to the jury the petitioner's burden of persuasion pursuant to N.J.S.A. 2C:4-2, it is submitted that the burden was implicitly imposed in the foregoing language in the charge thus violating Collier's due process rights.

Although this Court does not normally decide questions not raised below, it is not precluded from doing so. *Carlson v. Green*, 446 U.S. 14, 17 (1980); *Yorakim v. Miller*, 425 U.S. 231, 234 (1976). In exceptional cases, questions not passed upon below will be reviewed. *Duignan v. United States*, 274 U.S. 195, 200 (1927). It is submitted that here the circumstances justify dealing

with the issue at hand. The pertinent case law heretofore cited was not rendered prior to the petitioner's trial and subsequent appeal, thus precluding the presentation of the issue in reliance thereon until this time. It is submitted that the conflict between the State Supreme Court decisions and that of the Third Circuit in *Humanik* and this Court in *Martin v. Ohio* presents a sufficient reason to address the point despite its omission in prior proceedings. It is clear that the violation of the petitioner's due process rights constitutes a basic unfairness to this and other criminal defendants that might otherwise escape review if not presently considered by this Court. *Lear, Inc. v. Adkins,* 395 U.S. 653 (1969).

II.

This Court has not yet defined ambiguity in the context of an equivocal request for counsel nor has it ruled on the consequences of such ambiguity and state and federal courts have developed varying trends in considering this issue.

It is axiomatic at this juncture in criminal law that "an accused in custody, 'having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him' unless he validly waives his earlier request for the assistance of counsel. *Edwards v. Arizona,* 451 U.S. 477, 484-85, *reh. denied,* 452 U.S. 973 (1981)," *Smith v. Illinois,* 469 U.S. 91, 94-95 (1984). However, in recent years, the issue has arisen as to how law enforcement authorities should deal with ambiguous or equivocal requests for counsel, particularly in circumstances such as those present here, where the ambiguity involves an accused's misunderstanding as to his right to assigned counsel. *See Lightbourne v. Dugger,* 829 F.2d 1012, 1017-19 (11th Cir. 1987); *Smith v. Endell,* 860 F.2d 1528 (9th Cir. 1988); *United States v. Fouche,* 776 F.2d 1398, 1404-1405 (9th Cir. 1985); *United States v. Jardine,* 747 F.2d 945, 948-49 (5th Cir. 1984).

Specifically, where an accused stated that he could not afford an attorney after being informed of his rights, courts have construed this as an ambiguous request for counsel that precluded further interrogation except for questions designed to clarify the ambiguity. *United States v. Gofay,* 844 F.2d 971 (2nd Cir. 1988); *United States v. Yan,* 704 F. Supp. 1207, 1208-1210 (S.D.N.Y. 1989). The Supreme Court of New Jersey has held that a request, however ambiguous, to terminate interrogation or to have counsel present during interrogation must be scrupulously honored. *State v. Kennedy,* 97 N.J. 278, 288 (1984). It has not, however, squarely addressed whether a statement by an accused that he cannot afford an attorney constitutes such an ambiguous request.

It is submitted that the plethora of case law in lower courts with regard to the issue at hand requires the adjudication of the issue by this Court. The facts of the instant matter set squarely with those of *United States v. Gofay, supra,* where the accused informed investigators that she could not afford an attorney, which statement was held to be an equivocal request for an attorney, requiring clarification before continued interrogation by the police. *See also, United States v. Yan, supra,* 704 F. Supp. at 1204-1205 (defendant's statement that he could not afford an attorney construed to be equivocal request for attorney). The officer in the instant matter did not afford the petitioner the opportunity to complete his question: "Do you think I need an attorney or --," much less clarify any ambiguities. Rather, the officer cut Collier short in the midst of his sentence. Furthermore, upon having been re-read his rights, Collier, having been all but ignored when he previously stated he couldn't afford an attorney, stated he would talk to the interrogating detective but that he was "totally confused." The clear effect of the totality of these circumstances was an invocation of his Fifth Amendment rights. The officers had a duty to clarify Collier's statements which was not satisfied by the perfunctory attention he received. At any rate, "[D]oubts

must be resolved in favor of the constitutional claim." *Jackson v. United States*, 475 U.S. 639, 633 (1986).

The issue herein presented thus requires adjudication by the Court. There can be no question but that the petitioner's statements constituted an ambiguous request for counsel, in light of the case law surrounding such circumstances. The issues as to the degree of ambiguity which requires cessation of interrogation and the level of the duty to clarify an accused's equivocal statement which is imposed on an interrogator must be addressed. The question is important and likely to recur in future criminal litigation. Therefore, it is respectfully requested that the Court move to the merits of petitioner's claim.

III.

The definition of knowing murder under New Jersey law is excessive and therefore unconstitutional in its imposition of a harsher penalty for knowingly causing serious bodily injury, without requiring a state of mind with any relation to death, than for causing death by actions manifesting an extreme indifference as to the death of another.

The issue presented is whether the Eighth Amendment proscribes a sentence of thirty years without parole for the knowing infliction of serious bodily injury which results in death.

It is settled that the Eighth Amendment bars not only those punishments which are barbaric but also those that are "excessive" in relation to the crime committed. *Coher v. Georgia*, 433 U.S. 584, 592 (1979); *Gregg v. Georgia*, 428 U.S. 153 (1976); *Robinson v. California*, 370 U.S. 660 (1962); *Trop v. Dulles*, 356 U.S. 86 (1985). An excessive and therefore unconstitutional punishment may be one that is grossly out of proportion to the severity of the crime. *Coher v. Georgia, supra*, 433 U.S. at 592.

It is submitted that the sentence imposed upon Collier and defendants like him is grossly disproportionate and excessive punishment for the offense committed. The anomalous result of the statutory penalty applied in such cases is apparent. This Court was held that the "proportionality" analysis under the Eighth Amendment should be guided by objective criteria, including (i) the gravity of the offense and harshness of the penalty, (ii) the sentence imposed on other criminals in same jurisdiction and (iii) the sentence imposed for commission of the same crime in other jurisdictions. Under this objective criteria it is submitted that petitioner's claim is sound.

The petitioner was convicted of striking his victim, who fell to the floor and was rendered unconscious. Although death ensued, no evidence was presented at trial to suggest that death was even a remote thought in Collier's mind at the time of his offense. To convict and sentence him for knowing murder is thus wholly inconsistent with the offense.

As noted in Justice O'Hern's dissent in *State v. Gerald,* 113 N.J. 40 (1988), the requisite intent for criminal homicide necessarily involves some relation to death. Criminal law punishes culpable conduct upon a "graded spectrum of intent" built upon four different levels; purpose, knowledge, recklessness, and negligence. *State v. Breakiron,* 108 N.J. 591, 592 (1987). This has been recognized in the determination that one who is convicted of murder but intended not death, but serious bodily injury, may not be subject to capital punishment. *See, e.g., Enmund v. Florida,* 458 U.S. 782 (1982); *State v. Gerald, supra.* However, the New Jersey Supreme Court has rendered an anomalous construction of the homicide statute, since the mental state in the crime of aggravated manslaughter (extreme indifference to human life) is more culpable than "serious bodily injury" murder, yet the penalty imposed is far less extreme.

The result of this construction is a conviction for murder in a case such as this where an actor's conduct in striking another unexpectedly results in the unfortunate and virtually unforeseeable death of that person. Carried to extremes, an actor could, in the course of a fist fight, punch his opponent hard, thereby satisfying the requisite intent to cause serious bodily injury, and be convicted of murder if the victim should die of unforeseeable complications resulting therefrom. The possible factual scenarios are exponential when considering the potential for unjust convictions for murder under the present construction of the New Jersey homicide statute. Many courts recognize the necessity for some nexus between the actor's intent and the death of a victim with regard to conviction for murder. *See, e.g., Mason v. Balkcom,* 669 F.2d 222 (5th Cir. 1982), *cert. denied,* 460 U.S. 1016 (1983) [intent to kill is an essential element of murder]; *see also,* Montana Criminal Code (1983), §§ 94-5101, 5102 [purposely or knowingly causing the death of another human being]; Indiana Criminal Code, § 35-42-1-1 [murder constitutes knowingly or intentionally killing]; *United States v. Dixon,* 419 F.2d 288, 292-293 (D.C. Cir. 1969) [conviction for murder requires a wanton disregard for life which implies a defendant's awareness of the danger to human life, 18 U.S.C. § 1111].

The absolute magnitude of a crime is also relevant in an Eighth Amendment consideration. Thus, it has been held that a court may view assault with intent to murder as more serious than simple assault. *Roberts v. Collins,* 544 F.2d 168, 169-170 (C.A. 4 1976) (per curium), *cert. denied,* 430 U.S. 973 (1977). Clear distinctions in culpability may be recognized and applied. For example, in *Enmund v. Florida, supra,* the Court considered the petitioner's lack of intent to kill in determining his lesser culpability than his inmates. *Id.* 458 U.S. at 798. "Most would agree that negligent conduct is less serious than intentional conduct." *Salem v. Helm,* 463 U.S. 277, 285 (1983).

Applying objective criteria, it is submitted that the statute, as interpreted by the New Jersey court in *State v. Gerald, supra,* imposes a disproportionate sentence. It treats defendants like Collier more harshly than other criminals in the State who have committed more serious crimes. Therefore, the petitioner's sentence was significantly disproportionate to the crime and is thus prohibited by the Eighth Amendment.

Although the issue of the construction of the statute was raised in lower courts, that issue in conjunction with the Eighth Amendment has not been specifically raised until now. However, it should be noted that the statutory issue is not foreign to the appeal and that the New Jersey state courts are of the view that the statute is constitutionally sound. The decisions upholding such an interpretation of the statute could not have been rendered without determining that it was a fair application of the sentence. Thus, the logical presumtion is that the statute is not viewed by the Court as violative of the Eighth Amendment and that the judgment rendered could not have been given without deciding this federal question. *See Harding v. Illinois,* 196 U.S. 78 (1903). The Court is not precluded from deciding this question not raised below, *Carlson v. Green,* 446 U.S. 14 (1980), although ordinarily it would not. *Yorakim v. Miller,* 425 U.S. 231, 234 (1976). Whereas here, a question of great import is raised and where the lower court's decision implicitly uphold the consititutionality of the statute, this Court has reviewed questions not pressed or passed upon by lower courts. *See Carlson v. Green, supra.*

Had the petitioner relied upon the Eighth Amendment as a separate ground for his appeal, clearly the claim would have been rejected by the state court. In light of these circumstances, this case is at most marginally subject to the rule that this Court will not consider issues not pressed or passed upon in courts below. It is therefore respectfully requested that the Court grant the writ of certiorari with regard to the Eighth Amendment issue presented herein.

CONCLUSION

For these various reasons, this petition for certiorari should be granted.

Respectfully submitted,

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SPITZER
Attorneys for Petitioner

APPENDIX A — ORDER OF THE SUPREME COURT OF NEW JERSEY FILED DECEMBER 22, 1989

SUPREME COURT OF NEW JERSEY
M-520/521 September Term 1989

30,653

STATE OF NEW JERSEY,

Plaintiff-Respondent,

vs.

RICHARD COLLIER,

Defendant-Movant.

ORDER

This matter having been duly presented to the Court, it is ORDERED that the motion for leave to file motion for reconsideration as within time (M-520) is granted; and it is further

ORDERED that the motion for reconsideration (M-521) is denied.

WITNESS, the Honorable Robert L. Clifford, Presiding Justice, on Trenton, on this 21st day of December, 1989.

Stephen Townsend
Clerk of the Supreme Court

I hereby certify that the foregoing is a true copy of the original on file in my office.

Stephen Townsend
Clerk of the Supreme Court

APPENDIX B — ORDER OF THE SUPREME COURT OF NEW JERSEY FILED SEPTEMBER 11, 1989

SUPREME COURT OF NEW JERSEY
C-65 September Term 1989

30,653

STATE OF NEW JERSEY,

Plaintiff-Respondent,

vs.

RICHARD COLLIER,

Defendant-Petitioner.

ON PETITION FOR CERTIFICATION

To the Appellate Division, Superior Court,

A petition for certification of the judgment in A-85-85T4 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 6th day of September, 1989.

Stephen Townsend
Clerk of the Supreme Court

The Court, by a 5-2 vote denied the petition for certification.

Appendix B

JUSTICE HANDLER votes to grant certification and would remand the matter to the Appellate Division for reconsideration in light of *State v. Matulewicz*, 115 *N.J.* 191 (1989). JUSTICE O'HERN votes to grant certification and would remand the matter to the Appellate Division for further consideration in light of his concurring opinion in *State v. Gerald*, 113 *N.J.* 40, 133-144 (1988).

I hereby certify that the foregoing is a true copy of the original on file in my office.

Stephen Townsend
Clerk of the Supreme Court

APPENDIX C — MEMORANDUM DECISION OF THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION FILED MAY 23, 1989

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-85-85T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

RICHARD COLLIER,

Defendant-Appellant.

Argued: April 10, 1989 — Decided: May 23, 1989

Before Judges Petrella, Shebell and Gruccio.

On appeal from Superior Court, Law Division, Somerset County.

Jon Steiger argued the cause for appellant (Falvo, Bonello, Moriarty & Steiger, attorneys; Charles M. Moriarty, on the brief).

Cathleen Russo Delanoy, Deputy Attorney General, argued the cause for respondent (Peter N. Perretti, Jr., Attorney General, attorney; Ms. Delanoy, of counsel and on the brief).

Appendix C

PER CURIAM

Richard Collier was convicted by a jury of knowing murder (*N.J.S.A.* 2C:11-3a(2)).[1] In the death penalty phase the jury was unable to reach a unanimous verdict as to the death sentence. Accordingly, Collier was sentenced to 30 years in prison, without eligibility for parole during that period. See *N.J.S.A.* 2C:11-3b and c(3)(c). A $10,000 Violent Crimes Compensation Board penalty was assessed.

On his appeal, Collier raises the following arguments:

I. The judge's 'plain English' instructions as to the definitions of purposeful murder and knowing murder caused appellant, Richard Collier, to be convicted of murder without any finding as to his state of mind.

II. A new trial should be granted to the defendant in light of widespread and adverse publicity, prosecutorial misconduct, and partiality of the presiding judge.

A. The trial court improperly denied the motion for change of venue in the face of extensive media coverage and inflammatory headlines.

B. Prosecutor's statements and prosecutorial misconduct.

---

1. The indictment had charged Collier in the first count with purposeful murder (*N.J.S.A.* 2C:11-3a(1)) and in the second count with knowing murder as capital offenses.

Appendix C

C. The judge's failure to recuse himself contributed to an unfair trial for the defendant.

In a motion submitted over a year after appellant's brief was filed, Collier's attorneys raise and argue for the first time a *Miranda*[2] issue. Although the motion is untimely, see *R.* 3:5-7, we have considered the issue and conclude that it is wholly without merit. *R.* 2:11-3(e)(2).

In denying Collier's motion to suppress an inculpatory statement made during his custodial interrogation on September 13, 1984, the judge ruled that there was no evidence to suggest that Collier had made a request for counsel prior to this questioning. It was stated that after having received the *Miranda* warning, Collier indicated that he understood his rights and was willing to make a statement. Thereafter, he executed a written waiver.

Collier maintains that before the custodial interrogation began he specifically asserted his right to counsel when he asked the police officer whether he thought he needed an attorney. It is argued that after this question the officer should have stopped his interrogation. However, it appears that Collier did not even afford the officer an opportunity to respond, but rather Collier stated that he could not afford an attorney anyway. The officer then gave Collier the full *Miranda* warning, including the fact that if Collier could not afford an attorney, one would be provided for him.

Clearly, the question posed by Collier to the interrogating officer did not invoke his right to counsel necessitating that the

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2. *Miranda v. Arizona*, 384 *U.S.* 436, 86 *S.Ct.* 1602, 16 *L.Ed.*2d 694 (1966).

interrogation cease. See *State v. Gerald*, 113 *N.J.* 40, 118-119 (1988); *State v. Fussell*, 174 *N.J.Super.* 14, 20-21 (App. Div. 1980). See also *People v. Krueger*, 82 *Ill.*2d 305, 412 *N.E.*2d 537 (1980) (defendant's remark, which was apparently to the effect that "maybe I ought to have an attorney," "maybe I need a lawyer," or "maybe I ought to talk to an attorney," was not a positive indication of a desire for counsel). Rather, Collier apparently was aware that he might need the assistance of an attorney during his custodial interrogation, but decided instead to voluntarily waive this right and provide the police with a statement. Hence, Collier's inculpatory statement was properly admitted into evidence at trial.

We need not detail the circumstances of the crime at great length. Suffice it to say that Collier, who had been drinking, got upset with the four year old son of his girlfriend and beat the child for taking and losing his carpenter's tape measure. The child died of the injuries inflicted.

An investigating officer testified at trial about the statement given by Collier on September 13, 1984, after he had been advised of his rights, about his spanking the boy and punching him in the stomach, throwing him on the floor, and pushing him on the floor so that the boy's head bounced off the floor until he became unconscious. Collier had told the detective that the last time he pushed the boy on the floor his chin split open really bad, causing Collier to get real scared. Collier proceeded to bandage the boy's chin, and about 4:30 a.m. drove to his girlfriend's apartment and told her what had happened. The three of them then went in the girlfriend's car to the hospital. On route, according to what Collier told the police, his girlfriend instructed him to tell the hospital employees that the boy had fallen down the stairs. Following unsuccessful attempts to revive him, the boy was declared brain

dead on September 11, 1984. He was removed from the ventilator which was keeping him alive and died shortly thereafter.

At trial, Collier testified as to what happened as follows:

> The next thing I recall, I was looking in the dining room. I recall looking in there and seeing what I would have to do and so forth. Then all of a sudden Ricky is in front of me, right between my legs.
>
> I looked at him. He was very close to me. I was sitting with the chair turned sideways, away from the table. I don't know what I said to him.
>
> I know I smacked him in the stomach with the open hand. I touched him and I pushed him, I guess fairly hard, because he went and he hit the floor.
>
> When he hit the floor, I saw the blood. I jumped up and I was excited, I guess, or whatever I picked him up and I went over and got some yellow paper towels from the kitchen sink. I wiped his face off and took him in the bathroom.

Collier argues that the judge's "plain English" instruction to the jury on the definitions of purposeful murder and knowing murder caused him to be convicted of knowing murder without the jury having made a finding as to his state of mind. This "plain English" instruction followed requests by the jury for clarification of the definitions of purposeful murder and knowing murder after the jury had been instructed on the terms in accordance with the

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"Model Charge." There had been no objection to this aspect of the instructions as originally given.

In the initial instruction to the jury regarding purposeful and knowing murder, the judge had stated:

> The Defendant is charged, by the Indictment, for the murder of Richard Barboza. Murder is the unlawful killing of one person by another, purposely or knowingly. A person who commits a killing does so purposely when it is his conscious object to cause death or serious bodily injury, resulting in death. A person who commits a killing does so knowingly, when he is aware that what he is doing will cause death, or serious bodily injury resulting in death, or is practically certain to cause death, or serious bodily injury resulting in death.
>
> In either case, that is, whether the killing is committed purposely or knowingly, causing the death of or serious bodily injury must be within the design, or contemplation of the Defendant. Serious bodily injury means bodily injury which creates substantial risks of death, or causes serious permanent, or protracted loss, or impairment of the function of any bodily member or organ.
>
> You'll note that I've used the words purposely and knowingly. The nature of the purpose, or knowledge with which the Defendant acted, toward the decedent, Richard Barboza, is a question of fact for the jury to decide. Purpose and knowledge are conditions of the mind, which cannot be seen

and can only be determined by inferences from conduct, words, or acts. It is not necessary for the State to produce a witness, or witnesses who can testify that the Defendant stated, for example, that his purpose was to cause the death, or serious bodily injury resulting in death. Or that he knew that what he was doing would have killed the victim, or was practically certain to cause his death, or serious bodily injury resulting in death.

It is within the power of the jury to find that proof of purpose, or proof of knowledge has been furnished beyond a reasonable doubt, by inferences which may arise from the nature of the acts and circumstances surrounding the conduct under investigation. Such things as the place where the acts occurred, the location, number, and nature of wounds inflicted, and all that was done or said by the Defendant preceding with, connected with, and immediately succeeding the events leading to the death of the decedent are among the circumstances to be considered.

When an offense requires that the Defendant purposely or knowingly caused a particular result, the actual result must be with knowing or design or contemplation, as the case may be, of the actor, if not the actual result must involve the same kind of injury or harm as that designed or contemplated and not be too remote, accidental in its occurrence, or dependent on another's volitional act to have a just bearing on the actor's liability, or on the gravity of his offense.

After a short period of deliberation, the jury sent out the first of several notes to the judge asking if it would be possible to have the written definitions of purposeful and knowing murder. Rather than provide the jury with the requested written instructions, the trial judge again read the definitions contained in that portion of the original charge dealing with the law of murder. He also explained.

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> A person who commits a killing does so knowingly when he is aware that what he is doing will cause death or serious bodily injury resulting in death, or is practically certain to cause death, or serious bodily injury, resulting in death.

Subsequently, the jury sent the judge another note containing four questions. First, it again requested clarification of the states of mind necessary for murder. The jury also asked that the entire instruction as to each possible charge against Collier be reread, and that the differences between murder and manslaughter be explained. It also inquired whether defendant had to intend the death for there to be a murder conviction. Finally, the note stated:

> We are having difficulties with the purposeful murder charge. It comes with the term, 'or serious bodily injury resulting in death.' . . . If someone intends to cause serious bodily injury, which happens to result in death, is that considered purposeful murder?

The judge conferred with counsel and reread to the jury the portions of the original charge in response to their request for explanations of the states of mind necessary for murder and the differences between murder and manslaughter. He deferred answering the last two questions about whether defendant had to intend death for there to be a murder conviction and the above-quoted question regarding purposeful murder. The judge expressed the hope that the answer to the first two questions would obviate the necessity for further instructions. However, the jury sent out another request and asked that questions number three and four in the preceding note be answered. The judge concluded that in light of the difficulties the jury appeared to be having with the

language of the charge, it was obvious that he just could not keep reading the original charge to them over and over again. The judge felt obligated to translate the charge into understandable language and to do it as accurately as possible. Notwithstanding that defense counsel objected to what has been referred to as the "plain English" charge, the judge determined that he had to use different language to explain the charge. The judge offered defense counsel the opportunity to devise an alternative answer to the jury's question. Counsel suggested none and the defense attorney continued to request that the original charge be reread.

The judge responded to the jury's question as to whether there must be intent for death for the circumstances at bar to be considered murder by saying:

> No. Purposely causing serious bodily injury, which results in death, or knowingly causing serious bodily injury which results in death, is sufficient for a murder conviction.

As for the jury's difficulties with the purposeful murder charge, the judge instructed the jury, over defense counsel's objection:

> I have defined the phrase serious bodily injury for you. If you find that the State has proven beyond a reasonable doubt that the Defendant purposely inflicted serious bodily injury on Richard Barboza, which injury substantially contributed to Richard Barboza's death, then that is a purposeful murder. If you find that the State has proven beyond a reasonable doubt, that the Defendant knowingly inflicted serious bodily injury on

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> Richard Barboza, which injury (substantially contributed) to Richard Barboza's death, then that is murder.

On this appeal, Collier essentially argues that he was convicted solely on the basis of the "plain English" charge. He erroneously states that once this supplemental charge was read the injury came back with the verdict. His contention, however, is not supported by the record. After the third recharge, and on the second day of jury deliberations, the jury sent out a fourth note requesting that the descriptions of purposeful and knowing murder be completely reread to them "very slowly." The judge complied with that request and read the appropriate portions of the original charge as follows:

> A person who commits a killing, does so purposefully when it is his conscious object to cause death or serious bodily injury resulting in death.
>
> A person who commits a killing does so knowingly, when he is aware that what he is doing will cause death or serious bodily injury resulting in death or is *practically certain* to cause death or serious bodily injury resulting in death. (Emphasis added).

In response to subsequent requests the judge read the same language to the jury on two more occasions, on each occasion stating that the defendant must be "aware" that death or serious bodily injury resulting in death will result or be "practically certain" to occur.

Moreover, Collier's contention that the modified jury instruction was erroneous because it did not specify the requisite

state of mind for a knowing murder conviction is without merit. Specifically, Collier argues that under the "plain English" instruction the judge erroneously took away from the jury the requirement to find that he was aware that it was practically certain that his conduct would cause death as required by *State v. Breakiron*, 108 N.J. 591 (1987). He thus argues that at most he should only have been found guilty of manslaughter.

Relying on *Breakiron*, Collier maintains that the definition of "knowingly" in *N.J.S.A.* 2C:2-2b(2), as applied to *N.J.S.A.* 2C:11-3(a)(2), required the prosecutor to unequivocally prove that he was practically certain his conduct would result in the child's death in order for his knowing murder conviction to be upheld. This argument, although perhaps consistent with *Breakiron*, is inconsistent with the statutory language of *N.J.S.A.* 2C:11-3(a)(2) which specifies that murder exists when the actor knowingly causes death *or* serious bodily injury which results in death, and with the Supreme Court's subsequent decision in *State v. Gerald*, 113 *N.J.* 40, 81-82 (1988). The awareness or knowledge requirement is in the alternative as to death or serious bodily injury under the statute. *Ibid.* In *State v. Martin*, 213 *N.J.Super.* 426 (App. Div. 1986), we disagreed with an argument similar to that raised by Collier in this case. We there concluded that a murder conviction based on "knowing" conduct can result from conduct which is practically certain to cause serious bodily injury when death is a result of the injury caused. *Id.* at 433. See also *State v. Gilliam*, 224 *N.J.Super.* 759, 763 (App. Div. 1988) (murder does not require a specific intent to kill; knowingly committing bodily injury when death results is a sufficient element).

The language in *N.J.S.A.* 2C:2-2(b)(2) and *State v. Breakiron, supra*, of "practically certain" was utilized by the trial judge in each instruction to the jury except the "plain English" instruction. While it might be argued that the judge improperly instructed

the jury that knowingly inflicted serious bodily injury which substantially contributed to the victim's death is sufficient for a murder conviction, rather than using the words "aware" and "practically certain" (although he did use the terms "purposely" and "knowingly"), in our view any error was clearly harmless. This is so particularly in light of the fact that, aside from the correct original and next instruction, three correct instructions were given subsequent to the "plain English" charge. See *State v. Collier*, 90 *N.J.* 117, 123 (1982). It cannot be concluded that any error in the "plain English" charge, if one existed, could have erroneously contributed to the jury's verdict of Collier's guilt. No prejudicial error affecting Collier's right to a fair trial inhered in the "plain English" instruction under the circumstances. See *State v. Thompson*, 59 *N.J.* 396, 411 (1971); *State v. Council*, 49 *N.J.* 341, 342 (1967).

Moreover, portions of the charge are not to be considered in isolation, but rather in the context of the entire charge, including every recharge. The charge must be considered as a whole, and not limited to the portion alleged to be erroneous. *State v. Wilbely*, 43 *N.J.* 420, 422 (1973). In that context, we are satisfied that the instruction given to the jury was adequate.

In addition, contrary to Collier's arguments, the modified charge did not "obligate" the jury to return a guilty verdict as to knowing murder since Collier admitted to hitting the child. The jurors were not relieved of their fact-finding function as to Collier's state of mind. They were given sufficient information to allow them to conclude beyond a reasonable doubt that Collier was guilty of knowing murder.

In this case, the jury could have reasonably accepted Collier's confession and concluded that by knowingly hitting the child's head several times against the floor, Collier could have been practically certain that the young boy would suffer serious bodily

injury resulting in his death. The "plain English" charge did not amount to reversible error and was not capable of affecting the jury outcome or producing an unjust result. *State v. Macon*, 57 *N.J.* 325, 337 (1971); *R.* 2:10-2. Hence, a new trial is not warranted. *R.* 4:49-1.

We have considered Collier's remaining contentions in light of the record and the arguments of counsel and conclude that they are without merit. *R.* 2:11-3(e)(2). We add only the following comments. The publicity which preceded this trial was not such as would warrant a presumption of prejudice. In our view the principles set forth in *State v. Biegenwald*, 106 *N.J.* 13, 32 (1987) were not violated and there was no abuse of discretion in the judge's refusing to grant a change of venue. We also note that the trial judge inquired as to whether each potential juror had heard or read anything in reference to the case and that only one prospective juror out of the 31 questioned was excused because he had read a newspaper article relating to the admissibility of defendant's confession. Almost all of the jurors indicated that they had not heard or read anything about the case although four potential jurors stated they remembered reading defendant's name or reading briefly about the case, and one had heard defendant's name mentioned on the radio. All of these individuals acknowledged that defendant was presumed innocent. We also note that the prosecutor and defense counsel only utilized three peremptory challenges each during the *voir dire*. Moreover, during the course of the trial the jurors were continually reminded of their obligation not to discuss the case or read or listen to anything about the case. We must assume that the jury followed this instruction. *State v. Manley*, 54 *N.J.* 259, 270 (1969).

Although the prosecutor's remarks, which were quoted in the newspapers many months before the trial, were quite strong

and graphic, we are satisfied that with the passage of time between the date of those statements and the trial date, any potential impact they might have had was quite diluted. In any event, the jurors had no recollection of those statements and obviously had not been influenced by them.

Collier's claim that the trial judge should have recused himself because he had pointed out a deficiency in the indictment with respect to the death penalty claim aspect lacks any merit. The original indictment had omitted the requisite language of "by his own conduct," which is necessary in a capital indictment. See *R.* 3:7-3(b). There is no doubt that the original indictment clearly charged the offense. The language to the effect that the defendant committed the act by his own conduct is not an element of murder, but a triggering device regarding the death penalty phase of the trial. *State v. Moore*, 207 *N.J.Super.* 561, 576 (Law Div. 1985). Clearly, all counsel had been discussing the case in the pretrial stages as if it had been a death penalty case and the judge had an obligation to point out an inconsistency in the indictment. The case against Collier had been treated as involving a possible death sentence from the time of the original indictment. Because of this, the judge raised the question of possible deficiency of the indictment in charging a capital offense and invited counsel to comment and submit briefs. As a result, the original indictment was dismissed and a superseding indictment issued containing the previously omitted language. In response to defense counsel's request that Collier be allowed to proceed under the original indictment, the judge pointed out that in numerous affidavits defendant's attorney had taken the position that this was a death penalty case. Consequently, the judge denied the application. Under the circumstances, we see no error.

In addition, defense counsel had also moved to disqualify

the trial judge based on a comment made during his decision of a pretrial motion concerning whether the evidence supported the State's contention that the murder was outrageously wanton, vile, horrible or inhuman in accordance with the language of the statute. The judge had indicated that he had looked at the photographs of the dead four year old child and had considered the defendant's own description of what took place in those hours, and concluded that it was difficult to imagine a more inhumane course of conduct with respect to a child. He then went on to comment:

> I don't profess to be an expert in history or anything else, counsel. But the only thing that struck my mind last night as I was reviewing this matter, that one would have to refer to Dr. Mengele in his South American retreat to find someone who had inflicted further injury upon a child.

The trial judge declined to recuse himself, noting that *R.* 1:12-1 does not require disqualification because a judge has given his opinion on any question in controversy in a pending matter. Although we do not necessarily approve of the drawing of such a comparison, the trial judge had the function of determining whether the proofs to be presented would reach the threshold for a capital case.

The comment by the judge here does not demonstrate any partiality or prejudice on his part. He was the fact-finder on Collier's motion to dismiss the aggravating circumstances under *N.J.S.A.* 2C:11-3c(4)(c) and was required to decide whether there was evidence of an aggravated battery, torture or depravity of the mind on the part of Collier. The comment is obviously supportive of his ruling that there was sufficient evidence to allow

the aggravating factors. There is nothing in the record to suggest any prejudice by the judge against defendant in any respect. See *Johnson v. Salem Corp.*, 189 *N.J.Super.* 50, 60 (App. Div. 1983). Indeed, the record reflects that the trial judge appeared to go out of his way to provide assistance to defense counsel by furnishing helpful case citations, relaxing the required time for filing motions, and carefully assuring that proposed juror *voir dire* questions did not have the effect of advocating the death penalty. Moreover, *N.J.S.A.* 2A:15-49c, relied upon by Collier because it refers to a ground of disqualification if the judge has given an opinion upon a matter in question in the action, is totally inapposite. The concluding paragraph of this section of the statute says:

> This section shall not be construed to prevent a judge from sitting on such trial or argument because he has given his opinion in another action in which the same matter in controversy came in question or given his opinion on any question in controversy in the pending action in the course of previous proceedings therein, . . .

Our review of the record indicates that the judge took every reasonable measure to assure that Collier received a fair trial.

Affirmed.

I hereby certify that the foregoing is a true copy of the original in my office.

s/ R. Emille Cox
Acting Clerk